House Committee on Agriculture
"The Impact of EPA Regulation on Agriculture"
Questions for the Record
March 10, 2011

Chairman Frank D. Lucas, Oklahoma

Lucas 1.[OSWER] Are you aware that synthetic gypsum from power plants is not "coal ash" at all – but rather a byproduct of flue gas desulfurization (FGD) during the "scrubbing" process? If it's not coal ash, why are you including it in the regulations you are developing?

Answer:

Lucas 2. [OSWER] The people who use synthetic gypsum for agriculture now face a huge regulatory uncertainty because of the coal ash rulemaking. When do you plan to complete this rule? As you work to determine if this material should be classified as a "hazardous waste", how should we address parties who are interested in recycling it, but are stuck in limbo?

Answer:

Lucas 3. [OSWER] Are there ways that the EPA might encourage flue gas desulfurization (FGD) gypsum use in agriculture to help address water quality problems caused by degraded soils and excess nutrient loadings?

Answer:

Lucas 4. [OW]Can you comment on the use of synthetic gypsum to protect the Chesapeake Bay from nutrient runoff funded by the USDA Conservation Innovation Grants Program and the projects and studies underway and planned in the Great Lakes Region for the same effect.

Answer: We support the use of this technology as one approach for reducing nutrient runoff from agricultural operations through soil amendments that increase phosphorus adsorption capacity of farmland soils and buffer treatment to adsorb phosphorus before field runoff enters the streams and the Chesapeake Bay. Note that this is only one of many approaches that farmers can take to reduce nutrient losses from their operations. We have highlighted this approach along with other cost-effective, proven practices for reducing nutrients from agricultural operations in the *Guidance for Federal Land Management in the Chesapeake Bay Watershed* (http://www.epa.gov/nps/chesbay502/). Although this document was developed for federal lands, it acknowledges that a majority of land in the Chesapeake Bay watershed is nonfederal land, and also recognizes that the same set of tools and practices are appropriate for both federal and nonfederal land managers to restore and protect the Chesapeake Bay.

Lucas 5.[OAR] Ms. Jackson, you testified before the House Agriculture Committee. If I could, let me read from your statement. You said: "As I'm sure you would agree, Mr. Chairman, facts matter and we all have a responsibility to ensure that the American people have facts and the truth in front of them, particularly when fictions are pushed by special interests with an investment in the outcome. "Let me give you five examples: "One is the notion that EPA

intends to regulate the emissions from cows – what is commonly referred to as a "Cow Tax." This myth was started in 2008 by a lobbyist and –quickly de-bunked by the non-partisan, independent group fact-heck.org – it still lives on. The truth is – EPA is proposing to reduce greenhouse gas emissions in a responsible, careful manner and we have even exempted agricultural sources from regulation."
Your statement raises several questions:

- What is the basis of your statement that EPA has "even exempted agricultural sources from regulation"? Can you cite the place in the regulation that "exempts" agricultural sources?

- Are you exempting all agricultural sources or just some?
- Have you exempted any other sectors from the regulation?

- What authority does EPA to exempt certain sectors from the greenhouse gas rule? Where in the Clean Air Act is that authority?

- The Clean Air Act explicitly states that "major sources" – which is any entity that emits or has the potential to emit more than 100 tons of a regulated pollutant per year – must obtain a Title V operating permit. Is it your testimony that EPA is exempting all agricultural sources, regardless of their level of emissions, from the greenhouse gas regulations?

- EPA's own figures state that 37,000 farms are above the threshold of a major source. How can they be exempt under the law?

- If the basis of your statement is the tailoring rule, is it not correct to say that this approach only delays – it does not exempt – certain sources?

- Do you believe you have the authority to disregard the 100 ton and 250 thresholds in the law that defines major sources for the Title V and PSD programs?

Answer:

Representative Timothy V. Johnson, Illinois
Johnson 1. [OW] Ms. Jackson, one of the greatest challenges in rural America right now is addressing urgent water and wastewater needs for small rural communities. At the same time, the EPA continues to add layers of stringent regulations on these communities, requiring billions of dollars in new investments throughout each state. When developing a TMDL does the EPA consider the impact the implementation of the TMDL may have on water and sewer rates, especially across small rural communities? What remedies do you offer if the community is unable to finance changes to their system or build a new system?

Answer: The EPA recognizes the particular needs faced by rural communities in maintaining their water and wastewater infrastructure, and the EPA seeks to ensure that its programs are implemented in ways that recognize these specific challenges. In the context of TMDLs, most TMDLs are completed by the states, and this is EPA's preference. TMDLs must be approved by EPA, and to receive approval, they must identify pollutant reductions adequate to attain and

maintain water quality standards, including a margin of safety, regardless of cost. However, EPA encourages states to take into consideration implementation issues, such as the cost of implementation, when they develop TMDLs, although implementation plans for TMDLs are not required by federal law. The TMDL development process also provides opportunities for stakeholder input on how the TMDL would be implemented. States may also have the opportunity, should they wish to do so consistent with the Clean Water Act, to adopt temporary variances from their water quality standards, or they can set lower water quality goals to avoid widespread social or economic impacts. These changes would also require EPA approval.

Additionally, the Clean Water State Revolving Fund (SRF) is one mechanism available to communities for financing upgrades to publicly owned treatment works. The Clean Water SRF offers below-market interest rates that can make financing treatment plant upgrades more affordable for many communities. In addition, the FY2010 and FY 2011 appropriations allowed the SRF programs to use a portion of their capitalization grant to provide additional subsidy in the form of principal forgiveness, negative interest loans, and grants. States are encouraged to use this additional subsidy to provide financing to rural communities that could not otherwise afford a loan.

Representative Martha Roby, Alabama

Roby 1. [OW] First, I like to ask you about the EPA guidance document that would broaden the reach of the Clean Water Act. Many stakeholders in Alabama are concerned with how EPA is going to redefine "waters of the U.S" and how this will impact agriculture and the jurisdiction USDA and NRCS has through a MOU on wetland/stream issues? Also, can you please explain why this determination is being done through an internal guidance document as opposed to a formal rulemaking that would provide for public comment? It seems that a change to the definition of water in the U.S. will have far reaching effects and should be an open and transparent process.

Answer: The EPA and the U.S. Army Corps of Engineers (Corps) have drafted guidance that clarifies those waters over which the agencies will assert jurisdiction consistent with the CWA, implementing regulations, and Supreme Court interpretations. The draft guidance cannot and does not alter existing requirement of the law, it merely explains how the agencies think existing law should be applied in general, and emphasizes that it may not be applicable in particular cases. The scope of waters that would be protected under the interpretations in the draft guidance would remain significantly narrower than under the agencies' interpretations prior to the Supreme Court's decisions in *SWANCC* and *Rapanos*. All exemptions for agriculture in the CWA and regulations would be completely unchanged by the draft guidance. Also, the draft guidance should have no effect on USDA and NRCS agreements, including those undertaken under the auspices of the Food Security Act. The EPA and the Corps released the draft guidance for public notice and comment on May 2, 2011 with a 60 day comment period; this comment period was later extended until July 31, 2011. The agencies are now reviewing the comments received and will make decisions regarding any final guidance after carefully evaluating comments provided by the public. The agencies also expect to proceed with notice and comment rulemaking to further clarify the regulatory definition of the term "waters of the United States."

Roby 2.[OAR] In your testimony you refer to the EPA's latest actions in your review of the

National Ambient Air Quality Standards as required every five years under the Clean Air Act. The Second Draft Policy Assessment for Particulate Matter released on July 8, 2010 would establish the most stringent and unparalleled regulation of dust in our nation's history. If this ruling goes into effect, it appears that this would be impossible for farmers in Alabama to attain. Whether it is livestock kicking up dust, tractors going through a field or merely a car driving down a gravel road, farmers are going to be in noncompliance. And in times that Alabama faces extreme drought like a few years ago, it will only make it more impossible. What options are available to you regarding modifications to air quality standards regulations for farm dust?

Answer: The EPA remains committed to common sense approaches to improving air quality across the country without placing undue burden on our farmers. At present, we are in the process of reviewing the current National Ambient Air Quality Standard (NAAQS) for particles smaller than 10 microns (PM10). No decisions have been made on whether the standard should be revised. In general, if the agency were to change the form of the PM10 standard, it would most likely affect urban areas, where the majority of monitors are located, and would not likely adversely impact rural areas. Available air quality monitoring data suggest that a change in the form and level of the standard to provide at least equivalent public health protection as that afforded by the current standard may result in some areas that exceed the current standard coming into attainment, including areas where PM10 mass is comprised largely of dust, and some areas currently in attainment becoming out of attainment.

The EPA has not yet issued a proposed decision regarding whether or not to revise the national ambient air quality standards (NAAQS) for coarse particulate matter (PM10). In June 2010, the EPA released a second draft Policy Assessment prepared by agency technical staff. This document discusses a range of policy options which, in the view of the EPA staff, could be supported by the available scientific evidence.

In evaluating the range of options included in the Policy Assessment, it is important to remember that this is not a decision document and there will be ample opportunity for public input following the proposal. We remain committed to common sense approaches to improving air quality across the country without placing undue burden on farmers.

The EPA also recognizes that the U.S. Department of Agriculture (USDA) has been working with the agricultural community to develop conservation systems and activities to control coarse particle emissions. These USDA approved conservation systems and activities have proven to be effective in controlling these emissions in areas where coarse particles emitted from agricultural activities have been identified as a contributor to violations of the NAAQS. The EPA believes that where USDA approved conservation systems and activities have been implemented, these systems and activities could satisfy the Clean Air Act's reasonably available control measure and best available control measure requirements. The EPA will continue to work with USDA to prioritize the development of new conservation systems and activities; demonstrate and improve, where necessary, the control efficiencies of existing conservation systems and activities; and ensure that appropriate criteria are used for identifying the most effective application of conservation systems and activities.

Roby 3. **[OSWER]** In response to questions about treating milk as oil under the SPCC

regulations, you have repeatedly stated that the EPA does not intend to regulate milk. I suppose you recognize that these questions would not keep coming up had the EPA not withdrawn the proposed exemption issued by your predecessor in January of 2009. It is now 26 months later and the EPA has yet to issue a final rule exempting milk from the SPCC regulations. What are you planning to change in the proposed exemption that has taken you over 2 years to draft?

Answer: On April 12, 2011, the EPA issued its final rule exempting milk and milk product containers from the Oil Spill Prevention, Control, and Countermeasure (SPCC) rule. The final rule was published in the Federal Register on April 18, 2011 and became effective on June 17, 2011.

Roby 4. **[OSWER]** Does the EPA plan to regulate other low capacity on-farm storage? What kind of guidance and implementation time-frames will you consider for on-farm storage?

Answer: The Oil Spill Prevention, Control, and Countermeasure (SPCC) rule is not directed toward low capacity oil storage. It applies to farms that store more than 1,320 US gallons in total of all aboveground containers or more than 42,000 gallons in completely buried containers.

Regarding the implementation time-frames, the SPCC program requires the preparation and implementation of an SPCC Plan. Farms in operation on or before August 16, 2002, must maintain or amend their existing Plan by November 10, 2011. Any farm that started operation after August 16, 2002, but before November 10, 2011, must prepare and use a Plan on or before November 10, 2011. Assistance for farms is available through the EPA regional offices and at: http://www.epa.gov/emergencies/content/spcc/spcc_ag.htm.

Roby 5. [OAR] I am extremely concern over the proposed Boiler MACT rule to reduce pollution from industrial boilers. In Alabama, we have over 61 boilers with 51 of them in the wood products industry. I have heard from constituents that if it goes into effect that it would result in a loss of 17,000 jobs in mills plus nearly 55,000 jobs in the surrounding communities. New Air Regulations could total about $4 billion annually, which is over 4 times the entire industries profit for 2008. I do appreciate the response in February that your office gave me and my fellow freshman colleagues who wrote to you in the beginning of this Congress on this issue. In that letter you mention that you will be accepting more comments on the rule – Could you discuss what we should expect from the Agency in the next few months in how they will be collecting and reviewing these additional comments and when we expect you to take the next step on the final ruling?

Answer: Based on public comment and additional data provided during the comment period, the EPA made significant changes to the rules. The rules still achieve significant public health protections through reductions in toxic air emissions, including mercury and soot, but the cost of implementation was cut by about 50 percent from a version of the proposals issued last year. One of the changes made in the final rule was to combine coal and biomass fired boilers into a single subcategory, with the effect that owners and operators of biomass boilers will be able to comply more easily and at lower cost than was envisioned in the proposed rule. Also, as the result of the final rule defining nonhazardous solid waste, boilers burning clean biomass, or secondary biomass material generated through other processes that nonetheless is similar to clean biomass

will not be reclassified as solid waste combustors. In addition, wood residuals were removed from the definition of non-hazardous solid waste, which provides additional fuel flexibility for biomass boilers. Finally, owners of biomass boilers may submit case by case requests for other types of materials to qualify as fuels (and, if they qualify, be permitted to be combusted by units subject to the boiler major or area source standards rather than the incinerator standards).

Many biomass boilers are located at area sources of hazardous air pollutants. Area sources are typically smaller industrial or commercial operations/facilities. Significant changes were made to the area source requirements for biomass units. Under the final rule, existing area source biomass boilers are subject to a periodic tune-up requirement rather than the emission limits that were proposed. New biomass boilers are subject to emission limits for particulate matter that are reflective of readily available, proven, cost effective technologies that will not harm the economics of new projects at area sources.

The EPA believes further public review is required because the final standards significantly differ from the proposals. Therefore, the EPA has announced that it intends to reconsider certain aspects of the final standards under the Clean Air Act process for reconsideration, which allows the agency to seek additional public review and comment to ensure full transparency. This process will enable us to conduct further analysis of issues presented during and after the public comment period for the recently adopted rule, including any further information that the public and affected source owners choose to provide to the EPA. As part of the reconsideration process, the EPA will issue a stay postponing the effective date of the standards for major source boilers and commercial and industrial solid waste incinerators. EPA also announced that the agency would accept additional data and information regarding potential reconsideration of these standards until July 15, 2011. We intend to issue a proposed reconsideration decision by the end of October 2011 and to finalize a decision by the end of April 2012. This schedule will allow the agency to base the final standards on the best available data and provides the public with ample opportunity to submit additional information and input.

Representative Jean Schmidt, Ohio

Schmidt 1.[OCSPP] In your response to Chairman Lucas regarding biological opinions under the endangered species act, could you clarify for us what your plans are regarding external review?

Answer: In March 2011, on behalf of the Departments of Agriculture, Commerce, and Interior, the EPA requested that the National Academy of Sciences (NAS) convene a committee of independent experts to review scientific and technical issues that have arisen as a result of collective responsibilities under the Endangered Species Act (ESA) and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The recent experience of completing consultations under the ESA for FIFRA-related actions affecting Pacific salmon has illustrated a number of scientific issues. The scientific and technical topics on which we seek advice pertain to the approaches utilized by the EPA, the Fish and Wildlife Service of the Department of Interior, and the National Marine Fisheries Service of the Department of Commerce's National Oceanic and Atmospheric Administration in assessing the effects of proposed FIFRA actions on endangered species and their habitats. These topics include the identification of best-available scientific data and information; consideration of sub-lethal, indirect and cumulative effects; the effects of

chemical mixtures and inert ingredients; the use of models to assist in analyzing the effects of pesticide use; incorporating uncertainties into the evaluations effectively; and the use of geospatial information and datasets that can be employed by the departments and agencies in the course of these assessments. Two Biological Opinions developed by the National Marine Fisheries Service evaluating the impacts of six pesticides (carbaryl, carbofuran, chlorpyrifos, diazinon, malathion, and methomyl) on Pacific salmon will serve as examples to illustrate the scientific complexity of these issues. A concerted, closely coordinated effort to address these issues openly and actively will assist in the proper execution of the statutory responsibilities under the ESA, FIFRA and other applicable laws.

The Executive Branch is in the early stages of formulating the specific charge to the NAS panel. Based upon preliminary discussions with the NAS, we believe that the external review could be completed in approximately 18 months, once the panel is convened.

Schmidt 2.[OW/OGC] Last week, the EPA filed for an extension of the court order in the case NCC v. EPA to give additional time to complete consultations under the Endangered Species Act. Is the EPA guaranteed to receive the extension you requested?

Answer: On March 28, 2011, the United States Court of Appeals for the Sixth Circuit granted the EPA's 2nd Motion to Stay the Mandate until October 31, 2011 in the *National Cotton Council of America v. EPA* case.

Schmidt 3. [OW]If an extension is not granted, would EPA and the States be able to finalize a Pesticide General Permit by April 9th?

Answer: As discussed in the response above, on March 28, 2011, the United States Court of Appeals for the Sixth Circuit granted the EPA's 2nd Motion to Stay the Mandate until October 31, 2011 in the *National Cotton Council of America v. EPA* case.

Schmidt 4. **[OW]** In the absence of a Pesticide General Permit, could pesticide applicators be subject to citizen suits under the Clean Water Act for failure to obtain an NPDES permit?

Answer: As indicated in the responses above, pesticide applicators are not required to obtain an NPDES permit prior to October 31, 2011. After that date, an operator who does not have a permit and who discharges could be subject to enforcement under the Clean Water Act, including enforcement under the citizen suit provisions, where applicable.

Schmidt 5. [OCSPP] I want to turn attention to an issue pertaining to environmental justice and an issue that is very important to me and southern Ohio, bed bugs. Administrator Jackson, the EPA held a National Bed Bug summit in April of 2009 and again in February of 2011 with the goal of reviewing the current bed bug problem and identifying actions to address the problem. While I agree with the intent of the summit and some of the proposals, it seems as though the EPA is almost exclusively focused on outreach and prevention. Outreach and prevention are worthy and laudable goals, but it does nothing for people who actually have bed bug infestations, especially those living on fixed and lower incomes. Do you think that proper consideration was given to Section 18 exemption requests from states like Ohio for pesticide permits to eradicate

this pest?

Answer: The EPA's approach, as supported by CDC, DoD, HUD, NIH, and USDA, is not focused solely on outreach and prevention, but rather these efforts are part of a more comprehensive and multifaceted strategy that includes a variety of educational, non-chemical, and chemical approaches for bed bug management and control. Many involved in addressing bed bug infestations are now recognizing that no chemical is a silver bullet and that effectively managing bed bugs requires a comprehensive, collaborative approach.

The EPA's role is to carry out the Congressional mandate in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to ensure that pesticides are (1) safe and (2) available. We carry out that responsibility through rigorous scientific screening of pesticides and imposing limits on the use of registered pesticides to ensure that they do not harm people or the environment when used according to the label.

The EPA's assessment of the use of propoxur suggests exposures are not adequately protective of the public. Propoxur, along with other members of its chemical class, is known to cause nervous system effects. The agency's health review for its use on bed bugs suggests that children entering and using rooms that have been treated may be at risk of experiencing nervous system effects. Inhalation and hand-to-mouth exposure routes pose the most concern for children. A safety evaluation must support all emergency use patterns, and the current risk assessment does not support a general approval, as had been sought in Ohio's section 18 request.

Schmidt 6. **[OCSPP]** Has the EPA reached a final decision on Ohio's Section 18 request? If not, what mitigation measures is EPA presently considering? If EPA's decision to refuse the Section 18 request is final, is the Agency considering an alternative approach that Ohio and the other should pursue?
In December, several of my colleagues and I sent you a letter expressing our concerns about EPA's draft Pesticide Registration Notice (PR Notice) 2010-X entitled False or Misleading Pesticide Product Brand Names. The proposal would require registrants of consumer pesticide products to change trademarked brand names if they contain words that EPA now considers to be misleading such as "pro" or "green" even though the agency has previously approved these names. These products have been thoroughly evaluated through EPA's rigorous pesticide registration process and many of these products have been on the market for decades.

Answer: The EPA is open to working with Ohio and others to determine whether propoxur can be used in some capacity for the control of bed bugs. As you are aware, the EPA's review found the requested use presents an unacceptable risk because children exposed to propoxur in treated rooms may experience nervous system effects (cholinesterase suppression). Inhalation and hand-to-mouth exposure routes pose the most concern for children. In addition, during the propoxur product reregistration process (2007 to 2009), all indoor residential spray uses were deleted from product labels due to risks to children.

The EPA has communicated these results to the officials in Ohio. The EPA has offered Ohio the possibility of allowing the use of propoxur in locations where children would not be present, such as senior centers or other managed facilities with the ability to protect children from

exposure. At this time, Ohio state officials have not proposed to modify their propoxur request in that manner.

The EPA has also been in discussions with Ohio, and others, about the possibility of conducting additional toxicity testing that could assist the EPA in refining the risk assessment for propoxur.

Schmidt 7. [OCSPP] What evidence does EPA have to suggest that consumers are confused by pesticide product brand names? Many of the potentially affected products are decades old and familiar to consumers.

Answer: The EPA is aware of registrants' concerns about the draft PR Notice 2010-X concerning false or misleading pesticide product brand names. As background, for a registrant to lawfully sell and distribute a pesticide in the United States, the product cannot be "misbranded" as defined in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) [see FIFRA § 12(a)(1)(E)]. FIFRA defines "misbranded," in part, as having labeling that "bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular" [see FIFRA § 2(q)(1)(A)]. Therefore, if a brand name or product name that appears on a product's labeling is false or misleading, it would be a violation of FIFRA to sell or distribute the product. In addition, the EPA could not grant a registration to a product that would be misbranded [see FIFRA § 3(c)(5)(B)].

The draft PR Notice 2010-X does not require registrants to change pesticide product brand names; rather, it provides examples of brand names that may be considered to be false or misleading and describes a process for ensuring that brand names are not false or misleading by making changes such as replacing them or including qualifiers or disclaimers. Even though the PR Notice is still in draft, the FIFRA requirements apply to all pesticides, and when making decisions on registration applications or amendments, the EPA must determine whether labeling is false or misleading.

Regarding your question about consumers, the EPA does not make decisions about the acceptability of pesticide product brand names solely based on complaints from consumers. The basis for evaluating a product's brand name is initially the EPA's judgment as to whether that name appears to be "false or misleading in any particular" along with any evidence the EPA may possess indicating a name is false or misleading, consistent with the statute. The agency reviews a pesticide product's labeling and informs applicants or registrants if the agency finds specific statements, claims, product brand names, logos, pictures or other aspects of the labeling to be potentially false or misleading. For example, a product name containing the term "green" could mislead the consumer into believing that a product is totally safe for the environment and thereby cause consumers to ignore the safety warnings and precautions on the label.

When labeling is potentially false or misleading, the EPA may work with the applicant or registrant to modify the labeling so that it is not false or misleading before the labeling is approved. Occasionally, some applicants, registrants and distributors have considered or adopted product brand names (or placed company names or trademarks within or in close proximity to product brand names) that run counter to agency regulations and FIFRA concerning false or misleading claims. It is for this reason that the EPA believes that guidance issued in the

form of a PR Notice is needed to clarify its current interpretation of what product names may be false or misleading. Again, the PR Notice does not require any brand name to be changed, instead it provides guidance to registrants on what terms may be false or misleading as well as options for modifying labeling so that it is not false or misleading.

Finally, you may be interested to know that the EPA is considering narrowing the scope of the notice so that it focuses solely on safety- and composition-related terms, which would reduce the number of potentially affected products by roughly two-thirds (66%). For example, the term "pro" and other efficacy-related terms would be removed from the PR Notice.

Schmidt 8. **[OCSPP]** In his response to the letter from my colleagues and I, Assistant Administrator Owens states that "EPA believes that only a very small number of products will be affected by the final PR Notice," and "EPA believes that very few registrants, if any, would actually need to change their product brand names and that no significant adverse impacts should occur in the marketplace." However, an industry estimate suggests that the proposal could impact more than 5,000 currently registered pesticide products and result in a potential loss of approximately $2.5 billion in brand equity. What analysis did EPA conduct to support the conclusion that only a very small number of products will be affected? Can you explain the discrepancy between EPA's prediction of the proposal's affect and that of the industry?

Answer: In evaluating the public comments received on the draft PR Notice, the EPA has counted the products bearing brand names for federally registered pesticide products that contain the 21 terms listed in the draft notice as potentially false or misleading. The EPA has found a total of 1,322 federally registered product brand names (not including distributor products) containing those listed terms. As mentioned in the previous answer, the EPA is currently contemplating narrowing the scope of the notice so that it focuses solely on safety- and composition-related terms, which would reduce by about two-thirds (66%) the number of potentially affected products. Moreover, the draft guidance neither bans product names containing the example terms, nor does it require brand names to be revised. Rather, it clarifies that product names containing certain terms could potentially be false or misleading and provides options available to registrants for addressing such issues with the agency.

Schmidt 9. **[OCSPP]** What type of economic analysis has EPA done on the economic impacts to pesticide manufacturers, garden centers, retail stores and other businesses that sell pesticide products?

Answer: EPA works with pesticide companies and others on PR notices and takes into account the economic impacts. Nevertheless, as mentioned in the previous two answers, the EPA is considering narrowing the scope of the notice, which would decrease the number of products that might be affected by about two-thirds (66%). Therefore, the EPA estimates that only a very small percentage of all pesticide product brand names for current federally registered products would be likely to take any action in response to the PR Notice. Further, the PR Notice offers registrants simple and workable alternatives to changing or removing names such as by using disclaimers, qualifying statements, changing font type and size, and other methods short of removal or changes of trademarked names.

Schmidt 10. [OCSPP] Can EPA provide the Committee with assurances that it will refrain from requiring registrants to change existing product brand names through the registration process until a formal policy is finalized?

Answer: The EPA agrees that the draft PR Notice should not be implemented until we have duly considered all public comments received and have issued a final and effective PR Notice. However, in the absence of a final PR Notice, the EPA must continue to respond to potentially false or misleading terms in product brand names in a manner that is consistent with the law.

Schmidt 11. [OCSPP] Administrator Jackson, on January 7th your Agency declared that the purposeful introduction of fluoride, at significant levels, into drinking water is a critical public health practice that needs to continue. As you know, the Centers for Disease Control have called community water fluoridation one of the "ten greatest public health achievements of the 20th century". However, 3 days later, your agency proposed to prohibit the use of a vital food protection product – a product necessary to protect the US food supply - because it results in a small amount of fluoride to be introduced to the diet of some individuals.

Administrator Jackson – your agency is saying "Because we're worried about your health….we need to put it in your drinking water…BUT, because we're worried about your health….we need to take it out of your food."

Don't you agree that this is approach to public health, protection of the food supply and the environment is absurd? Wouldn't you agree that there HAS to be a better solution than this?

Answer: The EPA, CDC, and FDA worked closely to reach a shared understanding of the latest science on fluoride, in order to ensure a consistent, comprehensive approach. The agencies have concluded that the amount of fluoride to which people in the United States are exposed has increased over the last several decades since the introduction of drinking water fluoridation and consumer dental products (such as fluoride toothpaste and mouth rinses). This has led to a large decline in the prevalence of tooth decay, but has also been accompanied by a modest increase in the prevalence of dental fluorosis, a condition caused by fluoride over exposure that can cause dental effects ranging from barely visible lacey white markings, to more severe staining or pitting of the tooth's enamel. The proper levels of fluoride provide important benefits to dental health, and the majority of the U.S. population is not exposed to excessive levels. However, fluoride exposure is too high for some children, particularly those who live in areas with high levels of naturally occurring fluoride in drinking water.

The EPA is currently examining the fluoride drinking water standard and considering whether to lower the maximum amount of fluoride allowed in drinking water, which is set to prevent adverse health effects. In addition, the EPA is proposing to withdraw the fluoride tolerances for the fumigant sulfuryl fluoride because Section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA) prohibits the EPA from establishing tolerances for pesticides if aggregate exposure (exposure from all non-occupational sources, including drinking water and dental products) is not safe. Based on the recommendation of the National Academies of Science, as well as the EPA risk assessments, the EPA has determined that, in areas where drinking water contains naturally high fluoride levels, aggregate exposures to fluoride for infants and children under the age of seven years old can exceed a level that can cause severe dental fluorosis. The EPA

recognizes that in most such cases, pesticide residues would not be a primary source of exposure and removing such residues would generally not have a significant impact on risk or public health. EPA also recognizes the significant benefits that several uses of sulfuryl fluoride provide, but considerations such as these are not relevant under FFDCA Section 408 which requires the EPA to base its tolerance decisions on risk alone, even when the incremental risk is small. As explained in the Federal Register notice announcing its proposal in response to objections to the sulfuryl fluoride tolerances, EPA thinks that this action is required by Section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA). The Federal register notice containing EPA's proposal discusses the possible adverse impacts on public health and other consequences from a final decision to revoke the sulfuryl fluoride tolerances.
The EPA's proposed decision on sulfuryl fluoride was published in the Federal Register on January 19, 2011. The Agency accepted comments through July 5, 2011, and anticipates issuing a final decision in 2012. The EPA has proposed a three-year phase-out for most sulfuryl fluoride uses in order to provide time for users to transition to alternative treatments; the phase-out time would not begin until 60 days after the EPA publishes the final order in the Federal Register, likely in 2012.

Representative Dennis A. Cardoza, California
Cardoza 1. **[OW]** Administrator Jackson, the EPA recently announced an advance notice of proposed rulemaking seeking public input on the effectiveness of current water quality programs influencing the health of the San Francisco Bay Delta Estuary. The ANPR solicits comment on topics, such as potential site-specific water quality standards and site-specific changes to pesticide regulation. Can you explain the EPA's intent with this recent announcement? How do you intend to coordinate and work within the current BDCP process without causing more harm than good?

Answer: The EPA committed to complete this ANPR and public solicitation process in the Interim Federal Action Plan (IFAP) for the California Bay Delta Estuary developed in 2009 by six federal agencies. The IFAP describes various actions federal agencies committed to undertake, with the State of California, to investigate and mitigate the impacts of all stressors on the imperiled native species and the Bay-Delta Estuary aquatic ecosystem; to encourage smarter water use; to help deliver drought relief services; and to ensure integrated flood risk management. Water quality in the Bay Delta Estuary and its tributaries is impaired, contributing to the current ecological and water supply crisis. Specifically, the EPA's role in this initiative is to "assess the effectiveness of the current regulatory mechanisms designed to protect water quality in the Delta and its tributaries." This ANPR is the start of this assessment.

The comment period for the ANPR closed on April 25. The EPA will review the public responses to the ANPR, along with the significant scientific information developed about Bay Delta Estuary aquatic resources. We will synthesize all available information and develop a strategic proposal on how to use the EPA's authorities and resources to achieve water quality and aquatic resource protection goals in the Bay Delta. We will collaborate with the state and regional water boards, as well as with other agencies and stakeholders, to assure that our collective efforts are effective and efficient.

At the same time, the BDCP is being developed as a habitat conservation plan under the federal

Endangered Species Act and the state Natural Community Conservation Plan Act and is targeted to address primarily the impacts of the state and federal water export facilities on endangered and threatened species. The BDCP is expected to include proposals for changing how water is diverted and conveyed through the Bay Delta Estuary to the state and federal water export pumping facilities in the south Delta. The EPA's responsibilities under the Clean Water Act to protect designated uses of waterbodies, that may include estuarine habitat, fish migration, and threatened and endangered species, overlap with ESA requirements being addressed in the BDCP. Some actions taken pursuant to the BDCP will need to comply with both the ESA and Clean Water Act. To that end, the EPA will ensure that any action it might take as a result of this ANPR will be closely coordinated with other federal and state actions related to the BDCP, any biological opinions on water operations affecting the Bay Delta Estuary, and any other actions requiring ESA compliance.

Cardoza 2. **[OCSPP]** Administrator Jackson, EPA recently proposed to withdraw food tolerances of sulfuryl fluoride, a product critical to the protection of U.S. agriculture and especially specialty crops in California. This move is puzzling to me because it will negatively impact public health by increasing the potential for contamination and diminish producers' ability to export goods to foreign markets. Why is EPA issuing this proposal now? Can you tell me who are the actual beneficiaries of this proposed EPA action? And why is the Agency taking such an action given the importance of this product to agriculture and public safety?

Answer: As explained in the Federal Register notice announcing its proposal in response to objections to the sulfuryl fluoride tolerances, EPA thinks that this action is required by Section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA). The Federal register notice containing EPA's proposal discusses the possible adverse impacts on public health and other consequences from a final decision to revoke the sulfuryl fluoride tolerances.
The EPA, CDC, and FDA worked closely to reach a shared understanding of the latest science on fluoride, in order to ensure a consistent, comprehensive approach. The agencies have concluded that the amount of fluoride to which people in the United States are exposed has increased over the last several decades since the introduction of drinking water fluoridation and consumer dental products (such as fluoride toothpaste and mouth rinses). The EPA's fluoride risk assessment showed that children – particularly those living in those areas with naturally-occurring high levels of fluoride in the drinking water supply – are exposed to fluoride levels that can cause severe dental fluorosis. . Withdrawal of the sulfuryl fluoride tolerances will reduce these children's level of fluoride exposure. The EPA is also currently examining the fluoride drinking water standard and considering whether to lower the maximum amount of fluoride allowed in drinking water.

The EPA is proposing this action on sulfuryl fluoride because the governing statutory provision, Section 408 of the FFDCA, bars the EPA from establishing tolerances for pesticides if aggregate exposure (exposure from all non-occupational sources, including drinking water and dental products) is not safe. Based on the recommendation of the National Academies of Science as well as the EPA risk assessments, the EPA has determined that aggregate exposure to fluoride exceeds levels that can cause severe dental fluorosis in areas where drinking water contains naturally high fluoride levels. The EPA recognizes the significant benefits that several uses of sulfuryl fluoride provide and also the key role the availability of sulfuryl fluoride serves in

helping the EPA meet its obligations under the Montreal Protocol to reduce the use of the stratospheric-depleting pesticide, methyl bromide. Nonetheless, considerations such as these are not relevant under FFDCA Section 408 which requires the EPA to base its tolerance decisions on risk alone. EPA believes it has no discretion in this area; we are required by Section 408 to remove tolerances when aggregate exposure exceeds the safe level, even if only by a small amount for highly exposed populations, and even where the exposure from pesticide residues is insignificant compared with other sources of exposure, as in the case of fluoride.

The EPA's proposed decision on sulfuryl fluoride was published in the Federal Register on January 19, 2011. The agency accepted comments through July 5, 2011, and anticipates issuing a final decision in 2012. The EPA has proposed a three year phase-out for most sulfuryl fluoride uses in order to provide time for users to transition to alternative treatments; the phase-out time would not begin until 60 days after the EPA publishes the final order in the Federal Register, likely in 2012.

Cardoza 3. **[OCSPP]** Every year the USDA and EPA work in conjunction to release the Pesticide Data Program report. This report is an important tool for EPA in setting tolerance levels for pesticide residues for various commodities. The report demonstrates a robust reporting process and year after year shows that the vast majority of fruits and vegetables fall overwhelmingly below the tolerances set by EPA. Yet, every year there are groups which misconstrue this data to suggest certain conventionally grown commodities are unsafe for consumption. Can your office begin defending both the robust process which generates this report and the findings which demonstrate that safety of the food supply?

Answer: USDA's Pesticide Data Program (PDP) provides high-quality, indispensable pesticide monitoring data that is invaluable to the EPA in producing realistic pesticide dietary exposure assessments as part of its effort to implement the 1996 Food Quality Protection Act. The EPA works with USDA to ensure the information released through the PDP program is accurately described to the public.

PDP monitoring activities are a federal-state partnership. Samples of fruit, vegetables, and other commodities are collected from 10 participating states from all regions of the country representing 50% of the U.S. population. Samples are apportioned according to each state's population and the commodities selected are chosen, in part, for their significance in the diet. Specific emphasis is placed on sampling fruits and vegetables commonly consumed by children. The samples are collected close to the point of consumption - at terminal markets and large chain store distribution centers - immediately prior to distribution to supermarkets and grocery stores. Samples are collected based on a sampling design method that ensures that monitoring data are nationally representative of the U.S. food supply. They represent food that is typically available to the consumer for purchase throughout the year to provide the best available realistic estimate of exposure to pesticide residues in foods.

The data collected under this program is ideal in many respects for use in the EPA's exposure assessment for pesticides: samples are collected as close to the point of consumption as possible (while still retaining the identity of product origin) and sampling is based on statistically reliable protocols. Over the last 15 years, PDP has collected tens of thousands of samples of 85 different

commodities, analyzing for over 440 pesticides. During this time, only a small percentage of these samples found 1) pesticide concentrations above the legal limit allowed (referred to as a tolerance) or 2) pesticide residue on commodities that do not have a tolerance established for that chemical (while the presence of such residue may be illegal, it is not necessarily unsafe). The EPA routinely uses USDA's PDP data as a component of its risk assessments to ensure that risk estimates for the U.S. population and various subgroups are safe – that is, there a reasonable certainty of no harm.

Representative Reid J. Ribble, Wisconsin

Ribble 1. [OSWER] I appreciate that EPA intends to finalize an exemption for dairy under the Spill Prevention, Control, and Countermeasure rule. However, I have heard increasing concern from Wisconsin farmers about regulatory uncertainty because the Agency has yet to do so. When does EPA plan to finalize this exemption? This process is a cause for concern about EPA's overall methodology, seeing as milk is already regulated for quality and safety.

Answer: On April 12, 2011, the EPA issued its final rule exempting milk and milk product containers from the Oil Spill Prevention, Control, and Countermeasure (SPCC) rule. The final rule was published in the Federal Register on April 18, 2011 and became effective on June 17, 2011.

Representative Mike McIntyre, North Carolina

McIntyre 1. [OA] Administrator Jackson, two weeks ago, the Secretary of Agriculture gave testimony before this Committee on the current state of the agriculture industry. I don't think that anyone on this Committee would disagree with me that your agency, the EPA, was the most talked about topic by Members of this Committee. Whether you realize it or not, my constituents and many American farmers are very worried and upset over the number of regulations coming out of EPA that negatively impact farmers and ranchers. Given that perception can become reality, how do you intend to improve the EPA's record in the future? What fundamental changes in EPA's relationship with the agricultural community are you willing to commit to today?

Answer:

McIntyre 2: [OAR] Administrator Jackson, with regard to the national ambient air quality standards (NAAQS) for ozone:

- What are the parts per billion the EPA is considering?
- What would be the economic impact of lowering the standard to between 60 and 70 ppb?
- How does the EPA, or how will the EPA, work with communities that it designates as in nonattainment if there is a disagreement about the designation? For instance - if there are objections about the location of air monitors or if a community is already under an existing plan to improve air quality. Will the EPA work with them in a positive and collaborative manner?

Answer:

McIntyre 3. [OW] Administrator, there have been guidance documents seeking clarification of both the Solid Waste Agency of Northern Cook County (SWANCC) and Rapanos court decisions, but the uncertainties about the federal jurisdiction over wetlands and other waters remains highly controversial. The new draft guidance document was recently released to Inside EPA.

- What are the differences between this guidance and the ones previously released? What stage in the process is the document?
- In North Carolina, many farmers are worried that many new water bodies are going to fall under EPA and Army Corps regulation and require Federal permits. Under the draft guidance currently at OMB, how broadly do you expect the impacts to be on agriculture? Does the EPA envision regulating farm ponds and other water bodies located on farms?

Answer: The EPA and the Corps have drafted guidance that clarifies those waters over which the agencies will assert jurisdiction consistent with the Clean Water Act (CWA), implementing regulations, and Supreme Court interpretations. The draft guidance cannot and does not alter existing requirements of the law; it merely explains how the agencies think existing law should be applied in general, and emphasizes that it may not be applicable in particular cases. The agencies have worked carefully to assure that the draft guidance is consistent with the law and would not impact any of the existing statutory or regulatory exemptions for the nation's farmers. The agencies understand the important role played by farmers in conserving and protecting clean water and the environment. The EPA and the Corps released the draft guidance for public notice and comment on May 2, 2011 with a 60 day comment period; this comment period was later extended until July 31, 2011. The agencies are now reviewing the comments received and will make decisions regarding any final guidance after carefully evaluating comments provided by the public. The agencies also expect to proceed with notice and comment rulemaking to further clarify the regulatory definition of the term "waters of the United States," and to provide the public with an opportunity to participate in decisions regarding changes to the agencies' regulations. All exemptions for agriculture in the CWA and its implementing regulations would remain unchanged by the guidance, including the EPA's longstanding interpretation of 404(f)(1)(c) exempting farm ponds from CWA section 404 permitting requirements.

Representative Tim Huelskamp, Kansas

Huelskamp 1. [OSWER/OECA] In Parsons, KS, there is an ammunition depot that was closed during the latest round of the BRAC (Base Realignments and Closures) process in 2005. While the Army is attempting to close the base and turn it over to a redevelopment authority organized by the local community, you have attempted to require the Army and the community to make environmental improvements to the facility above and beyond those that are statutorily mandated. From where does the EPA believe their statutory authority governing these particular demands come? Further, I request the EPA provide documentation of this authority.

Answer: EPA believes that its authority to address environmental conditions at the KSAAP site comes primarily from the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). A RCRA permit was issued for the KSAAP site in 1989, which pursuant to requirements of RCRA section 3004(u) included a provision for "corrective action" – the requirement to clean up

releases of both hazardous wastes and hazardous constituents.

The Army is expected to finalize its transfer to the developer in the November/December 2011 timeframe. EPA and the state initiated the 30 day public notification process on September 28, 2011, to modify the existing RCRA corrective action permit that will ultimately facilitate the transfer of the KSAAP facility to the developer and the operating contractor after the land transfer occurs. The details of remediation requirements are being negotiated between EPA, DOD, the state, and the developer.

Huelskamp 2. [OAR] Do you intend to conduct a comprehensive cost/benefit analysis prior to proposing any changes to regulations concerning farm dust? What mitigation steps would you propose to ensure compliance with dust-related air quality standards?

Answer: The EPA remains committed to common sense approaches to improving air quality across the country without placing undue burden on our farmers. At present, we are in the process of reviewing the current National Ambient Air Quality Standard (NAAQS) for particles smaller than 10 microns (PM10). No decisions have been made on whether the standard should be revised. In general, if the agency were to change the form of the PM10 standard, it would most likely affect urban areas, where the majority of monitors are located, and would not likely adversely impact rural areas. Available air quality monitoring data suggest that a change in the form and level of the standard to provide at least equivalent public health protection as that afforded by the current standard may result in some areas that exceed the current standard coming into attainment, including areas where PM10 mass is comprised largely of dust, and some areas currently in attainment becoming out of attainment.

The EPA has not yet issued a proposed decision regarding whether or not to revise the national ambient air quality standards (NAAQS) for coarse particulate matter (PM10). In June 2010, the EPA released a second draft Policy Assessment prepared by agency technical staff. This document discusses a range of policy options which, in the view of the EPA staff, could be supported by the available scientific evidence.

In evaluating the range of options included in the Policy Assessment, it is important to remember that this is not a decision document and there will be ample opportunity for public input following the proposal. We remain committed to common sense approaches to improving air quality across the country without placing undue burden on farmers.

The EPA also recognizes that the U.S. Department of Agriculture (USDA) has been working with the agricultural community to develop conservation systems and activities to control coarse particle emissions. These USDA-approved conservation systems and activities have proven to be effective in controlling these emissions in areas where coarse particles emitted from agricultural activities have been identified as a contributor to violations of the NAAQS. The EPA believes that where USDA approved conservation systems and activities have been implemented, these systems and activities could satisfy the Clean Air Act's reasonably available control measure and best available control measure requirements. The EPA will continue to work with USDA to prioritize the development of new conservation systems and activities;

demonstrate and improve, where necessary, the control efficiencies of existing conservation systems and activities; and ensure that appropriate criteria are used for identifying the most effective application of conservation systems and activities.

Representative Larry Kissell, North Carolina

Kissell 1. [OAR] Administrator Jackson, while I am concerned with the impact of coarse particulate matter or PM 10 standards pertaining to farm equipment and rural roads, I am also troubled by the impact that the EPA's PM 2.5 standard may also have on rural America. PM 2.5 limits are currently set at 15 parts per billion (ppb), and now EPA is looking to make the PM 2.5 rule even stricter. New levels being considered are between 12 - 14 ppb - which are approaching naturally occurring background levels. For example, naturally occurring levels in rural North Carolina are at 12.8 ppb. Concerns over these new levels have prevented Charlotte Pipe from building a new green foundry in a rural area of my district. This rule could impact hundreds of other manufacturers that want to expand their capacity or build a new facility, and potentially not allow new jobs to enter rural America where they are surely needed.
Should, in the case of a new greener foundry replacing an older facility or the greener retrofitting of an old foundry be judged by the lessening of the particulate matter emitted relative to the old facility, rather than the aggregate particulate matter present in the location where the new facility is located?

Answer:

Kissell 2. [OSWER/OECA] Agribusiness retailers form the heart of fertilizer distribution in the U.S. and provide precision application that targets nutrients where they are needed. There are 6,800 agribusiness retailers in the country, almost a third of which are small businesses.
The EPCRA statute contains several exemptions from the definition of a hazardous chemical, including "fertilizer held for sale by a retailer to the ultimate customer" (hereinafter the "fertilizer retail exemption").
After 20 years of EPA upholding this exemption, Region 6 has reversed course and began enforcement and HQ staff are asserting that it no longer applies to simple mixing of fertilizers (with no chemical reaction)?" Can you please explain to the Committee why the Agency has chosen to side-step Congressional intent as it relates to the "fertilizer retail exemption" and what further action do you plan to take as it relates to this issue?

Answer:

Representative Jeff Fortenberry, Nebraska

Fortenberry 1. [OSWER] Does the EPA plan to regulate low capacity on-farm fuel storage?

Answer: The SPCC rule is not directed toward low capacity oil storage. It applies to farms that store more than 1,320 US gallons in total of all aboveground containers or more than 42,000 gallons in completely buried containers.

Fortenberry 2. [OAR] Does the EPA plan to regulate livestock emissions?

Answer: Under the Mandatory Reporting of Greenhouse Gases (GHGs) rule, certain livestock

facilities with manure management systems with emissions equal to or greater than 25,000 metric tons of carbon dioxide equivalent (CO2e) per year from a manure management system are required to report. No other GHG emission sources associated with agriculture are covered. However, the EPA is not currently implementing this part of the rule (subpart JJ) due to a Congressional restriction prohibiting the expenditure of funds in fiscal year 2011 for this purpose.

Representative Randy Hultgren, Illinois

Hultgren 1. [OW] If EPA and the Corps were to adopt the Draft 2010 Clean Water Protection Guidance as a final document, is there any water body or wetland that lies within the same watershed as a navigable or interstate water that would not have a "significant nexus" to that navigable or interstate water?

Under the Guidance, a "significant nexus" is sufficient to establish jurisdiction, so doesn't that mean that EPA or the Corps could assert jurisdiction over any water body or wetland?

Answer: The agencies do not believe that all water bodies and wetlands would be determined to be jurisdictional under the draft guidance. For example, most water bodies and wetlands historically regulated under the "other waters" provision of our regulations would not be found jurisdictional under the draft guidance. As stated in the guidance, while each situation must be evaluated on a case-by-base basis, the agencies believe that most water bodies that flow downstream to a traditional navigable or interstate water, as well as their associated wetlands, would be found to have a significant nexus to such downstream waters. We believe this is fully consistent with the SWANCC and Rapanos decisions. The agencies released the draft guidance for public notice and comment on May 2, 2011 with a 60 day comment period; this comment period was later extended until July 31, 2011. The agencies are now reviewing the comments received and will make decisions regarding any final guidance after carefully evaluating comments provided by the public.

Hultgren 2. [OW] The draft guidance provides no exceptions that are not in the statute or in existing regulations. Isn't it true that under the draft guidance EPA and the Corps could regulate almost any waters body or wetland on a case-by-case basis, even if the guidance says they are "generally not jurisdictional?"

These water bodies include ditches constructed wholly in dry land, artificial lakes and ponds used for stock watering or irrigation, rice fields, even water filled depressions from construction activity. Nothing in the guidance stops EPA or the Corps from arguing that a "significant nexus" exists between those water bodies and downstream navigable or interstate waters.

Answer: No. Past guidance issued by the agencies in 2008 also identified specific types of water as "generally not jurisdictional" such as swales or erosional features and upland ditches. Since that guidance was issued, the agencies have asserted jurisdiction over few, if any, of these waters. The draft guidance will not change this position.

Hultgren 3. [OW] In the SWANCC case, the court addressed an old quarry that was proposed to be filled in as a landfill. The Corps asserted jurisdiction because the quarry was used by

migratory birds. The Supreme Court said no. Under the draft guidance, couldn't EPA and the Corps assert jurisdiction over that quarry because it holds water and lies within in a watershed, even though it is isolated?

Answer: No, the guidance will not result in jurisdiction over the waters at issue in *SWANCC.*

Hultgren 4. [OW] Why are EPA and the Corps trying to change the policies of their agencies through a guidance document? The courts have said that an agency cannot do that without going through notice and comment rulemaking.

Answer: Guidance was previously issued by the agencies on this important issue in 2008. The agencies believe that farmers, homeowners, businesses, and others deserve additional transparency, consistency, and predictability in the process for identifying which waters are, or are not, subject to the requirements of the Clean Water Act. We do not believe that the 2008 guidance provides the necessary clarity and are therefore working to develop replacement guidance. The EPA and the Corps released the draft guidance for public notice and comment on May 2, 2011 with a 60 day comment period; this comment period was later extended until July 31, 2011. The agencies are now reviewing the comments received and will make decisions regarding any final guidance after carefully evaluating comments provided by the public. The agencies also expect to proceed with notice and comment rulemaking to further clarify the regulatory definition of the term "waters of the United States."

Hultgren 5. [OW] Why is EPA taking a single opinion and making it the law of the land? Courts have said that you can't turn a dissent into a majority opinion by combining it with a concurring opinion to argue that the position of the dissent and the concurrence constitute the opinion of the court – but isn't that what EPA and the Corps is proposing to do in the draft guidance?

Answer: It is the position of the United States that in the wake of *Rapanos*, CWA jurisdiction may be established using the standard set forth in either the plurality or Justice Kennedy's opinion. The U.S. established this position in the previous administration. This position is consistent with Supreme Court case law governing interpretation of the opinions of a divided court. Indeed, the four dissenting Justices in *Rapanos*, who would have affirmed the court of appeals' application of the Corps's regulations, stated explicitly that either the plurality test authored by Justice Scalia or the significant nexus test authored by Justice Kennedy could be used to determine CWA jurisdiction because they would uphold jurisdiction under either test.

Hultgren 6. [OW] The draft guidance goes far beyond even Justice Kennedy's opinion in the Rapanos case. In Rapanos, Justice Kennedy suggested that in some cases Justice Scalia's test would be broader than Justice Kennedy's "significant nexus" test. Justice Kennedy said that a surface water connection may not constitute a significant nexus if it was small and remote. In contrast, the draft guidance takes a very broad view of what is a tributary (and includes ephemeral streams) and then presumes that anything that can be considered a tributary has a significant nexus even if it has a small or no impact on downstream waters.

The draft guidance also says it does not matter how remote the waterbody is.

So, even if it is valid for EPA and the Corps to rely on the Justice Kennedy's significant nexus test, how can it go beyond it and assume jurisdiction over remote water bodies that have little or no impact on downstream waters?

Answer: As a part of the process of drafting guidance, the agencies worked hard to assess the potential economic effects of the guidance on potential permit applicants. As a part of this analysis, we looked carefully at the effect of the guidance on existing jurisdiction over streams and other tributaries, including ephemeral waters. The agencies assessment revealed that the draft guidance would have very little affect on the existing scope of Clean Water Act jurisdiction on streams and other tributaries. The major change that would result from the new guidance is that it would greatly improve transparency, consistency, and predictability in the process of identifying waters that are, or are not, subject to the Clean Water Act, and reduce existing delays in the process.

Hultgren 7. [OSWER] EPA has proposed regulations for coal ash disposal that include a possible "hazardous waste" designation. One of the materials included in that category is synthetic gypsum produced by power plants that can be safely and effectively used in agricultural applications.

- Doesn't it create a serious regulatory barrier to productively using a product when you label it a "hazardous waste" on the property of the person who makes it? If you were a farmer, would you want to place a material on your fields that the government considers hazardous waste on the property of the person who makes it?

- Are you aware that synthetic gypsum from power plants is not "coal ash" at all – but rather a byproduct of another process at the power plants? If it's not coal ash, why are you including it in the regulations you are developing?

- Does synthetic gypsum qualify as a "hazardous waste" based on its toxicity? Then why do you want to label it as hazardous and create all of this confusion?

- EPA previously supported the use of synthetic gypsum in agriculture, but cancelled the C2P2 program that provided that support. Is there a reason you did not notify your partner, the Department of Agriculture, before you terminated that program? Do you have any plans to resume active support for recycling coal ash and synthetic gypsum?

- The people who use synthetic gypsum for agriculture now face a huge regulatory uncertainty because of the coal ash rulemaking. When do you plan to complete this rule? Do you think it is fair to tell the world that you might decide to call this material a "hazardous waste" and then let people who want to recycle it just hang there for years while you think about it?

Answer:

Representative Scott R. Tipton, Colorado

Tipton 1. **[OP,OW,OCSPP,OAR,OECA]** Many of EPA's recent regulatory activities are in areas where there is a significant component of state delegated authorities and responsibilities (NPDES permitting, soil fumigant label changes, contemplated changes to PM 10 standards, etc). State budgets aren't growing. Additional resources are difficult to come by. How will states pay for these activities? If additional resources are not available, what regulatory or enforcement activities should states NOT do in order to take on these new responsibilities?

Answer:

Tipton 2. [OP,OW,OCSPP,OAR,OECA] How much of state budgets go toward "fixing" the problem, i.e. complying with EPA regulations? You mentioned grants to states. How much does a state or community have to contribute to receive these grants or other sources of funding to assist with compliance costs?

Answer:

Ranking Member Collin Peterson, Minnesota
Peterson 1.**[OARM]** According to OPM's website, the "Intergovernmental Personnel Act Mobility Program provides for the temporary assignment of personnel between the Federal Government and state and local governments, colleges and universities, Indian tribal governments, federally funded research and development centers, and other eligible organizations." The Committee became aware of a situation where EPA had entered into an Interpersonnel Agreement with a nonprofit, and the shared employee was lobbying on Capitol Hill for a piece of legislation involving EPA. How many IPA's are currently active? Is it possible to determine where EPA employees are currently working?

Answer: As of August 18, 2011, EPA has 23 employees serving under the Intergovernmental Personnel Act mobility program. They serve at the following organizations:

Mississippi Department of Marine Resources
The Nature Conservancy
The Environmental Council of the States
Navajo Nation EPA Superfund Program
The Oregon Extension of Eastern University
California Environmental Protection Agency
Environmental Law Institute
World Resources Institute
Florida Department of Environmental Protection
Puget Sound Partnership (2)
DePaul University
National Wildlife Federation
Lincoln University Graduate Center
Pennsylvania Department of Environmental Protection
Commonwealth of Puerto Rico – Environmental Quality Board (2)
Florida Department of Agriculture and Consumer Services
City of New Haven Office of Sustainability

North Carolina Agricultural and Technical State University
The Clean Air Institute
Navajo Nation Department of Justice
Western States Water Council

Peterson 2. [OCSPP] Recent court decisions have concluded that EPA's assertion that it has authority under FIFRA to bring a misbranding or other enforcement action prior to completing administrative procedures under FIFRA Section 6 based on the failure of the chemistry or compound to satisfy the requirements of risk mitigation decisions is arbitrary, capricious, an abuse of discretion, and contrary to law. Please provide committee with an expected timeline for completing the administrative procedures required under FIFRA section 6 for registrants with chemistries or compounds under risk mitigation review.

Answer: In May 2008, the EPA issued its Risk Mitigation Decision for Ten Rodenticides, specifying rodenticide product changes that must be made to allow for continued use that does not present unreasonable adverse effects to human health or the environment. On June 7, 2011, the EPA finalized the RMD, moving to ban the sale to residential consumers of the most toxic rat and mouse poisons, as well as most loose bait and pellet products. The agency is also requiring that all newly registered rat and mouse poisons marketed to residential consumers be enclosed in bait stations that will render the pesticide inaccessible to children and pets. The EPA intends to initiate cancellation proceedings under FIFRA against certain noncompliant products.

Peterson 3: [OAR/OECA] We appreciate EPA working with the livestock industry to collect information about current emissions on today's animal feeding operations. It was our understanding that the methodology for collecting the information was approved by EPA is that correct? Is there a timeline for analyzing this information? How are you engaging the scientific community to analyze and digest the information collected by the livestock industry? How will EPA go about using this information down the road?

Answer: The monitoring methodologies used in the National Air Emissions Monitoring Study were identified and selected by a broad group of stakeholders that included representatives from the EPA, USDA, the animal feeding operation (AFO) industry, state and local air agencies, and environmental groups. All stakeholders had a part in the development process, and the EPA approved the final methodologies. On January 19, 2011, the EPA issued a Call for Information seeking additional peer reviewed monitoring data on AFO emissions, along with information on how animals and waste are managed at specific sites. The deadline for submitting these data to the agency was March 7, 2011.

The analysis of the data will be conducted by OAR, with the assistance of their contractor, ERG, in a step wise manner beginning with the broiler industry, followed by the swine and egg-layers, and finishing with the dairy. As the analyses for each industry are developed, the drafts will be released on a rolling basis. Methodologies for the other species are scheduled to be completed and finalized by June 2012.

All stakeholders, including interested members of the scientific community, will be provided with an opportunity to review and comment on the draft methodologies. The EPA will announce

the availability of the draft methodologies for review in the Federal Register. In addition to the Federal Register Notice, the EPA will inform representatives of the major AFO trade organizations and other stakeholders that the draft methodologies are available for review and comment. Additionally, the EPA plans to hold informational webinars, informal meetings, and outreach sessions with all interested stakeholders to discuss the data, processes, and information gathered from the study. Other information submitted to the agency will also be included for review.

The EPA has made the National Air Emissions Monitoring Study reports and associated data available to all stakeholders at www.epa.gov/airquality/agmonitoring/.

The agency will be using the data and information collected from the study, as well as other submitted data, to develop better tools for estimating AFO emissions.

Peterson 4. [OAR/OECA] EPA recently released its latest draft report on biofuels and the environment. There seem to be inconsistencies in this report, as compared to outcomes from the RFS rulemaking. To what extent did the drafters of this report collaborate with USDA and other Federal agencies, and with other departments within EPA?
The draft report focuses on the potential negative environmental impacts of biofuels, but makes only the briefest comparison to the impacts from continued reliance on petroleum-derived baseline fuels. Will the final report attempt to correct this omission and go into further detail on both the potentially positive effects of biofuels on the environment, as well as the comparison to the environmental impacts of increasing dependence on marginal sources of foreign oil?

Answer: The EPA does not believe there are inconsistencies with this report to Congress and the RFS rulemaking. The basis for the Report to Congress was the RFS2 Regulatory Impact Analysis. This first Report to Congress reviews impacts and mitigation tools across the entire biofuel supply chain from feedstock production and logistics to biofuel production, distribution, and use with an emphasis on six different feedstocks and two biofuels. The two feedstocks most predominantly used currently are corn starch to produce ethanol and soybeans to produce biodiesel. Four other feedstocks (corn stover, perennial grasses, woody biomass, and algae) have been reviewed for purposes of comparative evaluation. These represent the range of feedstocks currently under development. The two biofuels considered are ethanol (both conventional and cellulosic) and biomass-based diesel, because they are the most commercially viable in 2010 and are projected to be the most commercially available by 2022.

In preparing the draft report, the EPA assembled a large team of scientists from across the agency's research laboratories and program offices, including close cooperation with the Office of Air and Radiation. In addition, the EPA received input from USDA and DOE staff scientists and held a series of briefings with each of these agencies to apprise their leadership of the approach and scope of the report. Before a draft was released for public comment, it was reviewed by each of these agencies and OMB.

Regarding the consideration of environmental impacts of biofuelds, EISA Section 204 calls for the EPA to report to Congress on the environmental and resource conservation impacts of increased biofuel production and use, including air and water quality, soil quality and conservation, water availability, ecosystem health and biodiversity, invasive species, and

international impacts. This report is the first of the triennial reports to Congress required under the 2007 Energy Independence and Security Act (EISA).

The EPA has done an extensive review and analysis of the published peer-reviewed scientific literature relevant to the environmental and resource conservation impacts of increased biofuel production and use. The published literature on comparing the environmental impact of biofuels with petroleum-based fuels is quite limited and would have required the authors to draw conclusions not supported by the literature to address this important issue. It is anticipated that the next Report to Congress, due in 2013, will likely include analyses that compare biofuel production with production of petroleum-based fuels.

Peterson 5. [OW] There is much criticism about the EPA's Florida proposal and this involves disputes about the underlying data, potential costs of complying with numeric standards when they are incorporated into discharge permit limitations, and disputes over the administrative flexibility. Also, some fear EPA's action in Florida will be a precedent for actions elsewhere. Are you aware of the EPA Region 5 letter to Illinois EPA on numeric nutrient standards? Do you intend to take the same actions in the states served by Region 5 that you have taken in Florida?

Answer: Nitrogen and phosphorus pollution is a widespread, serious, and growing problem. This pollution threatens our waters used for drinking, fishing, swimming and other recreational purposes. It can hurt the tourism industry, reduce home and property values, and impact public health. To help states address this pollution, on March 16, 2011, the EPA sent a memo to its regional offices that builds on our commitment to strengthen partnerships with states and promote collaboration with stakeholders on this issue. The agency will use this memorandum as the basis for discussions with interested and willing states about how to move forward on tackling this issue, recognizing that there is no one-size-fits all solution. The agency strongly believes states should address phosphorus and nitrogen pollution through standards they develop and supports these critical state efforts. At this time, the EPA is not working on any federal standards for phosphorus and nitrogen for any states other than ongoing efforts in Florida, but we are ready to provide support and technical assistant as states work to tackle this serious water pollution problem.

Peterson 6. [OW] We have been made aware of a memo dated March 16th which echoes the January 21st letter sent by Region V to Illinois EPA. The memo encourages Regional Administrators to work with states on reducing nitrogen and phosphorus loadings. Can you elaborate on what is meant by the sentence *"EPA will support states that follow the framework but, at the same time, will retain all its authorities under the Clean Water Act."*?

Answer: The EPA has oversight responsibility for many state activities under the Clean Water Act including, for example, state adoption of water quality standards and state implementation of the NPDES permit program where that program is delegated to a state. As the memorandum notes, the EPA encourages states to follow the recommended elements in the EPA's framework for state nutrient reductions and develop effective programs for reducing nitrogen and phosphorus loads in the near-term while they continue to develop state numeric water quality standards for nitrogen and phosphorus. As the memorandum notes, it is intended to stimulate a conversation. States retain broad discretion to design programs that meet their specific needs in

addressing nutrient pollution, and these programs do not have to adopt the recommendations in the memorandum. We look forward to working with states to assure effective protection of public health and water quality, consistent with the best-available science and the requirements of the CWA. We also recognize under the Clean Water Act that the EPA is accountable for effective implementation of the law.

Peterson 7. [OCFO] Have your staffing numbers been going up or down over the last 5 years? And how do the FTE levels compare in your program staff versus the enforcement and compliance staff over that same period?

Answer:

See chart on next page.

Programmatic NPMs and OECA FTE Utilization Trends

FY 2006 - FY 2010

	Actual FTEs					
NPM	**2006**	**2007**	**2008**	**2009**	**2010**	**2006-2010 Delta**
Office of Air & Radiation	1,830.7	1,807.6	1,807.5	1,843.3	1,852.9	22.2
Office of Water	2,131.9	2,097.6	2,088.9	2,124.7	2,207.0	75.1
Office of Chemical Safety and Pollution Prevention*	1,445.8	1,394.1	1,369.1	1,381.2	1,376.6	(69.2)
Office of Solid Waste & Emergency Response	2,719.2	2,664.7	2,678.7	2,684.9	2,738.5	19.3
Office of Research And Development	1,936.9	1,924.8	1,899.1	1,916.7	1,903.1	(33.8)
Office of International Affairs**	91.7	81.2	75.3	78.4	124.6	32.9
Programmatic NPM Total	**10,156.2**	**9,970.0**	**9,918.6**	**10,029.2**	**10,202.7**	**46.5**
Year-to-Year Delta		(186.2)	(51.4)	110.6	173.5	
Year-to-Year % Change		-1.83%	-0.52%	1.12%	1.73%	

	Actual FTEs					
NPM	**2006**	**2007**	**2008**	**2009**	**2010**	**2006-2010 Delta**
AA Enforcement	**3,316.2**	**3,293.7**	**3,264.9**	**3,260.0**	**3,284.5**	**(31.7)**
Year-to-Year Delta		(22.5)	(28.8)	(4.9)	24.5	
Year-to-Year % Change		-0.68%	-0.87%	-0.15%	0.75%	

NOTE: Data excludes enabling and support offices including: OARM, OCFO, OEI, OA, OIG, OGC. Utilization in support offices declined by 91.5 FTE.

***The utilization of FIFRA fees has declined over the years, but is largely offset by an increase in PRIA fees FTE. Reduction is in line with restructured**
****Increases in the Office of International Affairs in FY 2010 are due to the transfer of the Office of Tribal Affairs from the Office of Water to the Office o**

Peterson 8. [OW] There have been guidance documents seeking clarification of both the *SWANCC* and *Rapanos* court decisions, but the uncertainties about the federal jurisdiction over wetlands and other waters remains in limbo and highly controversial. A new guidance document was recently released to *Inside EPA*. What are the similarities/differences of this guidance related to the ones previously released? What stage in the process is the document?

Answer: The EPA and the U.S. Army Corps of Engineers (Corps) have drafted guidance that clarifies those waters over which the agencies will assert jurisdiction consistent with the CWA, implementing regulations, and Supreme Court interpretations. The draft guidance cannot and does not alter existing requirements of the law; it merely explains how the agencies think existing law should be applied in general, and emphasizes that it may not be applicable in particular cases. The scope of waters that would be protected under the interpretations in the draft guidance would remain significantly narrower than under the agencies' interpretations prior to the Supreme Court's decisions in *SWANCC* and *Rapanos*. All exemptions for agriculture in the CWA and regulations would be completely unchanged by the draft guidance. Also, the draft guidance should have no effect on USDA and NRCS agreements, including those undertaken under the auspices of the Food Security Act. The EPA and the Corps released the draft guidance for public notice and comment on May 2, 2011 with a 60 day comment period; this comment period was later extended until July 31, 2011. The agencies are now reviewing the comments received and will make decisions regarding any final guidance after carefully evaluating comments provided by the public. The agencies also expect to proceed with notice and comment rulemaking to further clarify the regulatory definition of the term "waters of the United States."

Peterson 9. [OGC/OAR] Can you explain how and/or what other Clean Air Act (CAA) authorities are triggered because of the emission standards for light duty trucks? For example, how did this trigger permitting provisions under Title V and the New Source Review?

Answer: The EPA promulgated the emissions standards for light duty vehicles under Clean Air Act (CAA) section 202(a). "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule," 75 Fed. Reg. 25,324 (May 7, 2010) (Vehicle Rule). The standards applied to cars and light trucks for model years 2012-2016, and were applicable to greenhouse gases (GHGs).

The promulgation of the Vehicle Rule triggered the application of the New Source Review Prevention of Significant Deterioration (PSD) permitting program and Title V permitting program. The PSD program is found in Title I, Part C of the CAA, and those provisions apply to any "major emitting facility," defined as a stationary source that emits or has the potential to emit 100 or 250 tons per year (depending on the type of source) of "*any* air pollutant." CAA section 169(1) (emphasis added). Such a facility may not initiate construction or major modification of its facility in such an area without first obtaining a PSD permit. *See* CAA sections 165(a), 169(1), 169(2)(C). For the last thirty years, the EPA has interpreted these provisions to require that PSD permits address "any air pollutant" that is "subject to regulation under the CAA" (except for a "criteria" pollutant for which an area has been designated non-

attainment under an applicable National Ambient Air Quality Standard).

The applicability provisions for the Title V permit program are found in CAA sections 502(a), 501(2)(B), and 302(j). These provisions provide that it is unlawful for any person to operate a "major source" without a title V permit and define a "major source" to include "any major stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." Taken together and in accordance with long standing EPA interpretation, these provisions provide that stationary sources are subject to Title V if they emit air pollutants that are subject to EPA regulation.

Thus, both PSD and Title V permitting requirements are triggered when pollutants become subject to EPA regulation. The Vehicle Rule made GHGs subject to EPA regulation for the first time, thus triggering the application of both PSD and Title V to GHG emissions from stationary sources. In a separate action, "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs," 75 Fed. Reg. 17,004 (April 2, 2010), the EPA determined that GHGs would become "subject to regulation under the Act," within the meaning of the CAA and the agency's longstanding PSD regulations and Title V interpretation, as of January 2, 2011, when the first new motor vehicles subject to the Vehicle Rule would enter the market. Likewise, the EPA explained that on the same date greenhouse gas-emitting sources would become subject to the Title V permitting program.

Peterson 10. [OAR] Following up on the previous question, I understand that in May 2010, EPA issued a rule on thresholds for GHG emissions that define when Title V and New Source Review permits would be required. This rule, the tailoring rule, establishes a threshold of 100,000 tons per year to those required to get a permit. Is there an agriculture exemption in this rule? Why not? If the goal is not to get small farms, why not include a straight exemption? You indicated in your response to Congressman Welch during questioning that "agriculture is exempted from greenhouse gas regulation." Can you explain what you meant by that?

Answer:

Peterson 11. [OAR] With regards to the tailoring rule, exactly what happens to whom after July 1, 2011?

Answer:

Peterson 12. [OAR/OGC] EPA has been sued by a number of parties who argue that the Tailoring Rule is illegal. What is the status of these lawsuits? What is your best estimate as to when we will have a final outcome to these lawsuits? If the Tailoring Rule is struck down in court, how will you change your approach to regulating greenhouse gas emissions from stationary sources?

Answer: The lawsuits have been brought in the United States Court of Appeals for the District of Columbia Circuit, and have been consolidated. The parties are in the process of filing their briefs on the merits According to the briefing schedule set by the Court, merits briefing will be completed on December 14, 2011. Although the Court has not set a date for the oral argument,

we expect that the Court will set the date for early in 2012. If it does so, then the EPA would expect, consistent with the Court's past practice, a decision in the summer or fall of 2012. For the reasons that the EPA explained at length in the Tailoring Rule preamble and in our successful defense of the rule against the motions for stay, we believe we have a solid legal basis for the rule.

Peterson 13. [OAR/OGC] Since the publication of the greenhouse gas "Tailoring Rule" in June 2010, has EPA been petitioned to lower the threshold level of air pollutants that requires a Title V permit? If so, how is EPA responding to any such petition?

Answer: The EPA has not received any petitions to lower the threshold level of air pollutants that requires a Title V permit.

Peterson 14. [OCSPP] Recent court decisions have concluded that EPA's assertion that it has authority under FIFRA to bring a misbranding or other enforcement action based upon the failure of a chemistry or compound to satisfy certain risk mitigation decisions is arbitrary, capricious, an abuse of discretion, and contrary to law. Given these court decisions, please provide the Committee with timeline of the steps EPA intends to undertake to complete the administrative procedures required by FIFRA Section 6 for chemistries or compounds that have failed to satisfy the risk mitigation decision process.

Answer: Repeated question. Please see response to Peterson 2.

Peterson 15. [OCSPP] EPA staff has indicated that it is considering revising its approach to making a "public interest" finding for USDA's IR-4 Project applications under the Pesticide Registration Improvement Reauthorization Act (PRIA2). IR-4 sets it research priorities in an open public setting with significant input from the affected agricultural sector and uses government funds to develop data accordingly. How would the new approach for a "public interest" finding affect IR-4 applications?
Please describe any financial impacts that may result from a change under the new approach for a "public interest" finding as it relates to IR-4 applications? Would such a change potentially increase the costs for IR-4 applications and thereby serve to reduce IR-4's applications for new pesticide uses on specialty crops/minor uses? Has EPA examined how this action might impacts on certain crops, the significant new costs to IR-4 in and the unintended consequences to some federal government priorities associated with such a change? Has EPA discussed this issue with USDA and, if so, does USDA support the approach being considered? In view of the vital and important role that IR-4 serves, does the Agency believe that it needs additional clarification from Congress regarding why IR-4 applications are in the public interest and therefore should continue to be exempt from PRIA fees?"

Answer: The public interest finding describes the EPA's current approach in determining whether an IR-4-associated application is in the public interest. Since 2003, the EPA has gained substantial experience in making these determinations, many on a case by case basis. Based on this experience, the EPA developed the finding to improve the efficiency of the exemption process and to provide the public, growers, and the EPA's own staff with the basis for these public interest findings and the existing approach.

Existing policies and practices will continue and will not change. IR-4 applications remain the same. There are no additional application requirements, and, therefore, the costs for IR-4 applications will not increase and there will be no financial impacts to IR-4.

Because the EPA's current approach is based on experience, the type of application that has been in the public interest in the past will continue to be in the public interest under this draft finding. Growers will see no difference and will continue to receive the same benefits from the IR-4 program. A common understanding of the approach will benefit and increase the efficiency of the collaboration between IR-4, USDA, the EPA, and the agricultural community.

Peterson 16. [OGC] Can you please provide the Committee with copies of all documents that meet all the following criteria?

1) A settlement agreement entered into by the EPA;
2) In response to any civil action, administrative adjudication or petition for review brought against the EPA or the Administrator of EPA;
3) During the period of January 1, 2006 through March 10, 2011.

Answer: EPA will need more time to respond to this request. The EPA plans to treat this request, together with question 17 below, as it would a letter to the agency and will respond in writing to the request and question 17 in a separate communication.

Peterson 17. [OGC] At the hearing, in response to a question about whether EPA's settlement agreements are made public, Administrator Jackson stated, "…most of our settlements are required by law to go through public comment."

- Since 2006, which proposed settlement agreements, other than those related to cases in which EPA took enforcement action against an individual or entity, were published in the *Federal Register* for public comment?
- If some, but not all, settlement agreements are published for public comment, explain how EPA and the Department of Justice determine which to open for public comment. Have the criteria for these determinations changed since January 1, 2006, and, if so, how? Please distinguish between civil actions or petitions for review brought against the agency from civil or criminal enforcement actions taken by the agency against an individual or entity.
- Please explain in detail, how, since January 1, 2006, EPA has amended settlement agreements, other than those related to cases in which EPA took enforcement action against an individual or entity, after such agreements have been open for public comment.

Answer: This question is related to the document request in question 16 and the EPA will need further time to respond. The EPA will respond to the document request under question 16 and to this question in a separate communication, as explained above.

Peterson 18. [OGC] The following questions relate to the settlement agreement that EPA signed with the Waterkeeper Alliance, Natural Resources Defense Council, Inc., and Sierra Club on May 25, 2010:

- When was the proposed settlement agreement published for public comment?
- Is the final settlement agreement posted on either EPA's or the Department of Justice's website?
- EPA has stated that its determinations on whether or not to settle with a petitioner are based on case-by-case determinations of legal risk and the requirements of the law. Please explain in detail why EPA determined that it was necessary to settle with the environmental petitioners (Waterkeeper Alliance, Natural Resources Defense Council, Inc., and Sierra Club).
- Why were the agricultural petitioners (National Pork Producers Council, National Chicken Council, and American Farm Bureau Federation) not included in the settlement negotiations? Did the Department of Justice or EPA make the decision not to include the agricultural petitioners in the settlement negotiations?
- Since the settlement agreement was reached with the environmental petitioners, has EPA conducted settlement negotiations with the agricultural petitioners?
- In negotiating and entering into this settlement agreement, what considerations did EPA make regarding the increased regulatory burden that would be placed on the owners or operators of concentrated animal feeding operations (CAFOs)?
- EPA will soon be publishing a proposed rule to effectuate the policy changes that EPA agreed to implement in the settlement agreement. If there is a public comment period for the proposed rule, does EPA have the flexibility to make substantive changes to the proposed rule following the comment period, or is EPA legally bound to adhere to the settlement agreement? If EPA were to make substantive changes to the proposed rule, what legal effect would such changes have on the settlement agreement?
- The settlement agreement requires EPA to collect detailed information from CAFO owners or operators. The information will be made public unless there is a showing that the information is a confidential trade secret, pursuant to 33 U.S.C. §1318(b). What does EPA consider to be a confidential trade secret? For instance, would owner/operator names, locations, numbers of animals, whether a CAFO has a nutrient management plan, or whether a CAFO has applied for an NPDES permit be made public?
- How does EPA plan to use the information that it collects?
- On March 16, the U.S. Court of Appeals for the 5th Circuit ruled that EPA could not mandate that a CAFO that "proposes" to discharge obtain a National Pollutant Discharge Elimination System permit. How will this ruling impact the settlement agreement and the expected proposed rule?

1. When was the proposed settlement agreement published for public comment?

   Answer: The settlement agreement was not published in proposed form for public comment. The Clean Water Act, unlike the Clean Air Act, does not require settlement agreements entered into under the statute to be published for public comment before being finalized. Under the settlement agreement, the EPA committed to propose collecting certain identifying information from CAFOs, or if the agency does not propose collecting this information, to explain why it is not proposing to do so. The agency will publish that proposal for public notice and comment and will seek stakeholder input on it before taking any final action. EPA did not commit in the settlement agreement to take

any specific final action. The specific provisions of the settlement agreement addressed a proposed rule only.

2. Is the final settlement agreement posted on either EPA's or the Department of Justice's website?

   Answer:. The final settlement agreement is publicly available. With some exceptions, neither the Environment and Natural Resources Division of the Department of Justice nor EPA generally posts final settlement agreements in petition for review cases on its website. The EPA will post on its website any guidance or proposals which it undertakes to issue pursuant to such a settlement agreement.

3. EPA has stated that its determinations on whether or not to settle with a petitioner are based on case-by-case determinations of legal risk and the requirements of the law. Please explain in detail why EPA determined that it was necessary to settle with the environmental petitioners (Waterkeeper Alliance, Natural Resources Defense Council, Inc., and Sierra Club).

   Answer: The environmental petitioners filed petitions for review raising two challenges to the EPA's final rule entitled "Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision: Final Rule, 73 Fed. Reg. 70,418 (Nov. 20, 2008). First, they challenged the EPA's failure to require CAFOs that are known to discharge to apply for NPDES permits. Second, they challenged the EPA's analysis of "best conventional pollutant control technology" for fecal coliform. After weighing the legal risks of litigating these issues, the EPA, with the Department of Justice's concurrence, determined that settling this case was the most effective way of resolving the controversy in furtherance of the goals of the Clean Water Act.

4. Why were the agricultural petitioners (National Pork Producers Council, National Chicken Council, and American Farm Bureau Federation) not included in the settlement negotiations? Did the Department of Justice or EPA make the decision not to include the agricultural petitioners in the settlement negotiations?

   Answer: The EPA prefers, where possible, to reach agreement with all stakeholders to avoid further litigation. In this case, the EPA had conversations with the agricultural petitioners in an effort to reach settlement but was unable to reach agreement with them. The EPA and the Department of Justice generally include only the party or parties with which they are settling in settlement negotiations.

5. Since the settlement agreement was reached with the environmental petitioners, has EPA conducted settlement negotiations with the agricultural petitioners?

   Answer: No. Prior to reaching a settlement with the environmental petitioners, the EPA had conversations with the agricultural petitioners in an effort to reach settlement. However, as indicated above, the EPA and the agricultural petitioners were unable to

reach settlement.

6. In negotiating and entering into this settlement agreement, what considerations did EPA make regarding the increased regulatory burden that would be placed on the owners or operators of concentrated animal feeding operations (CAFOs)?

   Answer: The EPA did not commit in the settlement agreement to take any final actions that would affect CAFOs. The EPA committed to propose collecting certain identifying information from CAFOs, or if the agency does not propose collecting this information, to explain why it is not proposing to do so. The EPA's proposal will be subject to public notice and comment before the agency takes any final action on it. Further, the agency believes that reaching out to agricultural stakeholders to discuss their views on such a collection would be an essential part of its decision making process. Minimizing any burden on the regulated community is a priority for the EPA and the agency will welcome CAFO owners and operators' views as to how best to achieve that goal.

7. EPA will soon be publishing a proposed rule to effectuate the policy changes that EPA agreed to implement in the settlement agreement. If there is a public comment period for the proposed rule, does EPA have the flexibility to make substantive changes to the proposed rule following the comment period, or is EPA legally bound to adhere to the settlement agreement? If EPA were to make substantive changes to the proposed rule, what legal effect would such changes have on the settlement agreement?

   Answer: The settlement agreement does not bind the EPA to any specific final action. It requires the EPA to propose collecting certain identifying information from CAFOs, or, if the agency does not propose to collect that information, to explain why it is not proposing to do so. The EPA will solicit public comment on the proposal. After considering comments, the EPA has the flexibility to make substantive changes to the proposed rule and will have the option to determine, in its final action, how much, if any, of the information it will collect. Further, the settlement agreement specifically states that it does not in any way limit the EPA's discretion under the Clean Water Act or general principles of administrative law.

8. The settlement agreement requires EPA to collect detailed information from CAFO owners or operators. The information will be made public unless there is a showing that the information is a confidential trade secret, pursuant to 33 U.S.C. §1318(b). What does EPA consider to be a confidential trade secret? For instance, would owner/operator names, locations, numbers of animals, whether a CAFO has a nutrient management plan, or whether a CAFO has applied for an NPDES permit be made public?

   Answer: As stated above, the settlement agreement does not require the EPA to collect any information. It requires the EPA to propose collecting certain information, or, if the agency does not propose to collect that information, to explain why it is not proposing to do so. The EPA will solicit public comment on the proposal before taking final action. The EPA did not commit in the settlement agreement to the content of its final action.

If the EPA decides, in a final rule, to collect information from CAFOs, it would collect that information pursuant to Section 308 of the Clean Water Act, the Act's information-gathering authority. Section 308 requires the EPA to make public any information the EPA collects under the rule unless that information is confidential business information (CBI). CBI is defined and discussed in the EPA's regulations codified at 40 C.F.R. part 2, subpart B For any information collection requirement that EPA finalized, CAFOs would be given the opportunity to identify what information they believe qualifies as CBI. EPA would treat any such claimed CBI in accordance with its regulations, which generally require that the submitter of the information have the opportunity to substantiate their claim. EPA would then determine whether the claimed information meets the definition of CBI, and not release the information if it did.

9. How does EPA plan to use the information that it collects?

   Answer: If the EPA were, in a final action, to determine to collect any information from CAFOs, the EPA would use the information to further its statutory duties to restore and maintain the quality of this nation's waters. In support of these responsibilities, the EPA develops and enforces regulations, assesses the effectiveness of its programs, awards grants, researches environmental issues, sponsors partnerships, educates the public, and publishes information. A basic inventory of CAFOs, which is generally what the settlement agreement addresses, could be useful for any of these purposes.

10. On March 16, the U.S. Court of Appeals for the 5th Circuit ruled that EPA could not mandate that a CAFO that "proposes" to discharge obtain a National Pollutant Discharge Elimination System permit. How will this ruling impact the settlement agreement and the expected proposed rule?

    Answer: The Court of Appeals' decision in *National Pork Producers Council et al., v. EPA* does not address EPA's authority to collect information pursuant to section 308 of the Clean Water Act. The decision therefore would not affect the EPA's data collection proposal.

Peterson 19. [OW] When EPA is negotiating a settlement, and it becomes clear that the agency will propose a rule as a result of the settlement, does EPA conduct an economic analysis of the impact of the impending regulation during settlement negotiations? If not, does EPA conduct an economic analysis of the impact during the rulemaking process? If the economic analysis shows problems with the proposed rule, does EPA have the authority to change the rule, or would that negate the settlement agreement?

Answer: Where the EPA agrees under a settlement to propose a rule, it does not conduct an economic analysis. Whether the EPA conducts economic analysis of the impact of any given proposed rule depends on the nature of the rule in question. The EPA does not commit in settlement agreements to final, substantive outcomes of rulemaking and retains adequate discretion under its settlement agreements to address the results of any economic analysis undertaken in connection with a proposed rule. For this particular proposal related to the

settlement agreement described above, the EPA is required to determine information collection costs pursuant to the Paperwork Reduction Act. EPA expects that the costs of collecting the basic inventory information addressed in the settlement agreement would generally be low and unlikely to pose a significant regulatory burden.